Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

BONNIE VAN WINKLE,

Petitioner

VS.

THE STATE OF TEXAS,

Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE TEXAS COURT OF CRIMINAL APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Petitioner was denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

BONNIE VAN WINKLE,

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VS.

STATE OF TEXAS,

Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE TEXAS COURT OF CRIMINAL APPEALS

The Petitioner, BONNIE VAN WINKLE, respectfully prays that a Writ of Certiorari issue to review the decision of the Texas Court of Criminal Appeals entered on August 17, 1994, refusing Petitioner's petition for discretionary review of the judgment and

opinion of the Fourth Court of Appeals of the State of Texas entered on February 28, 1994, affirming Petitioner's conviction. Petitioner filed a Motion to Stay the Mandate Pending Petition for Writ of Certiorari with the Fourth Court of Appeals on September 16, 1994, and the stay is pending. See Appendix at p. A-1.

OPINIONS BELOW

The original opinion of the Fourth Court of Appeals of the State of Texas affirming Petitioner's conviction was entered on December 29, 1993, but was withdrawn and a new opinion was issued on Petitioner's motion for rehearing on February 28, 1994, which is reproduced in the Appendix at page A-9. The Fourth Court of Appeals issued a supplemental opinion on Petitioner's petition for discretionary review on May 4, 1994, which is reproduced in the Appendix at page A-4. None of the opinions of the Fourth Court of Appeals

were published.

The order of the Texas Court of Criminal Appeals refusing Petitioner's petition for discretionary review was entered on August 17, 1994, and is reproduced in the Appendix at page A-3.

STATEMENT OF JURISDICTION

The Texas Court of Criminal Appeals refused the Petitioner's petition for discretionary review of the judgment and opinion of the Fourth Court of Appeals on August 17, 1994.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (1993), which authorizes review by this Court of a final judgment rendered by the highest court of a State where a right is specially set up or claimed under the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United

States Constitution providing in pertinent part as follows:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . .

2. The Sixth Amendment to the United States Constitution providing in pertinent part as follows:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.

3. Section 1 of the Fourteenth Amendment to the United States Constitution providing in pertinent part as follows:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. The following Texas statutes and rules are discussed in this Petition and are reproduced, in pertinent part, in the Appendix hereto:

Sec. 22.01(a)(2), Tex. Pen. Code Ann. (Vernon 1989) at p. A-36.

Sec. 22.02(a)(2)(A), Tex. Pen. Code Ann. (Vernon Supp. 1994) at p. A-36.

Art. 1.14(b), Tex. Code Crim. Proc. Ann. (Vernon Supp. 1993) at p. A-36.

Art. 36.19, Tex. Code Crim. Proc. Ann. (Vernon 1981) at p. A-37.

Art. 42.12, § 3g(a)(2), Tex. Code Crim. Proc. Ann. (Vernon Supp. 1994) at p. A-38.

Rule 3.03, Texas Disciplinary Rules of Professional Conduct, Tex. Gov. Code Ann., Title 2, Sub. G, App. A, Art. 10, Sec. 9 (Vernon Supp. 1993) at p. A-38.

STATEMENT OF THE CASE

On February 13, 1992, Petitioner was convicted by a jury of two counts of aggravated assault against a police officer in violation of Section 22.02(a)(2)(A) of the Texas Penal Code Ann. (Vernon Supp. 1994) in Cause No. 91-07-145-CRW, in the 81st Judicial District Court, Wilson County, Texas. Petitioner had fired one warning shot from a gun late one night as two men who turned out to be

Texas Department of Public Safety officers were backing out of her private driveway with her teenage son in their vehicle. Petitioner was sentenced to five (5) years incarceration, plus a $10,000 fine.

Petitioner perfected her appeal to the Fourth Court of Appeals of the State of Texas, and raised the issue of ineffective assistance of counsel for the first time in her amended brief submitted to the appellate court. The Fourth Court of Appeals had jurisdiction pursuant to Article 4.03 of the Texas Code of Criminal Procedure Ann. (Vernon Supp. 1994), which authorizes appeals in criminal cases from the final judgment of a district court. The Fourth Court of Appeals issued an opinion affirming Petitioner's conviction on December 29, 1993.

The Fourth Court of Appeals withdrew its original opinion and issued a new opinion on Petitioner's Motion for Rehearing on February

28, 1994, in which it again affirmed the judgment of conviction. See Appendix at A-9. Finally, the Fourth Court of Appeals issued a supplemental opinion on Petitioner's Petition for Discretionary Review on May 4, 1994. See Appendix at A-4.

Petitioner filed a Petition for Discretionary Review of the Fourth Court of Appeals' judgment and opinion with the Texas Court of Criminal Appeals, the highest court in Texas with jurisdiction over criminal cases, on April 20, 1994. The petition for discretionary review was refused by the Court of Criminal Appeals on August 17, 1994. See Appendix at A-3. The Texas Court of Criminal Appeals had jurisdiction pursuant to Article 4.04 of the Texas Code of Criminal Procedure Ann. (Vernon Supp. 1994).

Throughout her appeal, Petitioner has asserted that the performance of her retained trial counsel was deficient and prejudicial

under the standard set forth by this Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), which was adopted by the Texas Court of Criminal Appeals in Hernandez v. State, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986). Petitioner asserted in the state appellate courts and now asserts in this Court that the following acts and omissions by her trial counsel, viewed in the context of the totality of the representation, failed to meet the Strickland standard of reasonably effective assistance:

1. Lack of knowledge of the applicable law and facts of the case, specifically, the elements of the offense, what conduct was sufficient to satisfy the elements, the felony category of the offense and the means of committing the offense (S.F., Voir Dire, p. 9-12, Vol. I, p. 182);

2. Lack of knowledge of the correct range of punishment and of the lack of

authority of the trial judge to grant probation after the jury had denied probation and made a deadly weapon finding (S.F., Vol. IV, p. 9-12);

3. Failure to object to or amend a deficient indictment omitting required elements of the offense, thereby waiving the error (Tr., p. 1 and Appendix at p. A-34); and

4. Failure to object to, or request a proper version of, a deficient jury charge omitting required elements of the offense and the related definitions, thereby failing to preserve the error. (Tr., p. 25; S.F., Vol. II, p. 395-398 and Appendix at p. A-35).

It is proper procedure in the Texas system to seek relief on an ineffective assistance of counsel claim through an appeal to the court of appeals, and the error is properly preserved when it is raised on appeal. Randle v. State, 847 S.W.2d 576, 580 (Tex. Crim. App. 1993, en banc) (a defendant cannot,

by inaction at trial, waive the right to make a claim of ineffective assistance of counsel). Petitioner has exhausted her appeal in the state system, and now seeks relief in this Court.

Petitioner herein reurges the argument that her counsel's performance fell below the level of the "reasonably effective assistance" guaranteed by the Sixth and Fourteenth Amendments. Petitioner further argues that the decisions of the Texas Court of Criminal Appeals, and of the Fourth Court of Appeals, conflict with this Court's decision in Lockhart v. Fretwell, 506 U.S. ___, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993), due to their misapplication of the prejudice prong of the Strickland test.

REASONS FOR GRANTING THE WRIT

I.

The Performance by Petitioner's Trial Counsel was Deficient and Prejudicial under the Standard Set Forth in

Strickland v. Washington.

Under the standard set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), a defendant has the burden of rebutting the presumption of effective assistance by proving by a preponderance of the evidence (1) that her trial counsel's performance was deficient and (2) that the deficient performance prejudiced the defense to such a degree that she was deprived of a fair trial. Whether the Strickland standard has been met is judged by the "totality of the representation" rather than by isolated acts or omissions of trial counsel, and the test is applied at the time of trial not through hindsight. Strickland, 466 U.S. at 689; Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). The Texas Court of Criminal Appeals, and the Fourth Court of Appeals, erred in holding that the performance of Petitioner's

trial counsel was not deficient or prejudicial under Strickland.

A. Lack of Knowledge of Law and Facts.

Petitioner's trial counsel was not sufficiently prepared and did not have sufficient knowledge of the facts and law applicable to the case, as evidenced by the following conduct by counsel:

1. During voir dire, Petitioner's counsel objected to the State's characterization of the offense as a first degree felony because the face of the indictment referred to it as a third degree felony, despite well established Texas caselaw that the caption and other identifying information are not part of the indictment. S.F., Voir Dire, p. 9-12; Garza v. State, 653 S.W.2d 850 (Tex.App.-Corpus Christi 1982, no pet.).

Moreover, Section 22.02(c) of the Texas Penal Code Ann. (Vernon Supp. 1994), provides that the aggravated assault offense prescribed

by that section is a third degree felony unless it is committed under subsection (a)(2) and the person uses a deadly weapon, as was the case in Petitioner's offense; in that event, the offense is a first degree felony. Counsel for Petitioner apparently was not familiar enough with the facts of the charged offense or Section 22.02 to realize that Petitioner was standing trial for a first, not a third, degree felony.

2. Counsel also argued that the indictment alleged "pointing a gun," not firing a gun, as support for his position that the offense was a third degree felony, even though it is well established in Texas that pointing a gun can support a first degree felony conviction of aggravated assault based on a threat of imminent bodily injury. S.F., Voir Dire, p. 11; Sanchez v. State, 769 S.W.2d 348 (Tex. App. - San Antonio 1989, no pet.).

In addition, the facts of the case were

that Petitioner had fired the gun, and not merely pointed the gun, as argued by her counsel. S.F., Voir Dire, p. 11, Vol. I, p. 182. There was conflicting evidence presented at trial as to whether Petitioner fired the gun into the air as a warning or fired in the direction of the police car carrying her son away. Cf. S.F., Vol. I, pp. 182, 37, 95.

3. Assuming counsel legitimately believed the charged offense was a third degree felony, his mistaken belief would necessarily mean that the range of punishment he anticipated and should have discussed with his client in due course of preparation would have been substantially less than the five years to life which Petitioner was actually facing. Sec. 12.32, 12.34, Tex. Pen. Code Ann. (Vernon Supp. 1994).

4. During the punishment phase of trial, counsel vigorously urged the erroneous argument that the trial judge had the

authority to grant probation in this case even though the jury had denied probation and made an affirmative finding of use of a deadly weapon. S.F., Vol. IV, p. 9-12. Counsel's argument was in direct contravention of the express language of Section 3g(a)(2) of Article 42.12 of the Texas Code of Criminal Procedure Ann. (Vernon Supp. 1994), which denies the court the authority to grant probation in an aggravated assault case after the jury has denied probation and made an affirmative finding of use of a deadly weapon.

Counsel had a duty to bring to bear such skill and knowledge as would render the trial a "reliable adversarial testing process" by investigating the particular facts of the case and researching the applicable law of the case. Strickland, 80 L.Ed.2d at 694. The Fourth Court of Appeals dismissed Petitioner's claims of deficient performance as trial strategy; however, it may not be argued that a

given course of conduct was within the realm of trial strategy unless and until the attorney has conducted the necessary legal and factual investigation which would enable him to make an informed rational decision. Strickland, 466 U.S. at 691; Kimmelman, 91 L.Ed.2d at 325-326. A decision not to investigate must be reviewed for reasonableness in all the circumstances. See, Burger v. Kemp, 483 U.S. 776, 107 S.Ct. 3114, 97 L.Ed.2d 638, 657 (1987). Counsel's lack of preparation on the law and facts cannot be considered part of a reasonable trial strategy.

B. Failure to Object to Defects in Indictment and Jury Charge.

The essential elements of the offense of aggravated assault of which Petitioner was convicted are set forth in Section 22.02(a)(2)(A) of the Texas Penal Code Ann. (Vernon Supp. 1994), which is reproduced in

the Appendix at p. A-36. The indictment in Petitioner's case omitted the element of threatening with imminent bodily injury, which is part of the Texas Penal Code definition of simple assault in Section 22.01(a)(2), and the element of lawful discharge of an official duty by the peace officers, which is prescribed in the definition of aggravated assault in Section 22.02(a)(2)(A) of the Texas Penal Code. See, Appendix at p. A-36. Also see, Recer v. State, 785 S.W.2d 430 (Tex. App. - Houston [14th Dist.] 1990, reversed on other grounds) (threatening with imminent bodily injury a required element); Damian v. State, 776 S.W.2d 659 (Tex. App. - Houston [14th Dist.] 1989, pet. ref'd)(lawfully discharging an official duty a required element).

The jury charge tracked the language of the indictment and was therefore defective in that it omitted the definition of assault and incompletely stated the elements of the

offense by omitting "threatening with imminent bodily injury" and "lawful discharge of the officers' official duty." See Appendix at p. A-35.

Counsel's failure to object to or correct the error in the indictment and charge resulted in the complete waiver of the error with respect to the indictment and in a much higher standard of review with respect to the charge error. At the time of trial, it was well established that the omission of required elements in an indictment would no longer be considered "fundamental error" and would be waived if not objected to before trial. Art. 1.14(b), Tex. Code Crim. Proc. Ann. (Vernon Supp. 1993); Studer v. State, 799 S.W.2d 263 (Tex. Crim. App. 1990); Flowers v. State, 815 S.W.2d 724 (Tex. Crim. App. 1991). See Appendix at p. A-36.

It was equally well established at the time of trial that the failure to object to

defects, or propose the proper issues and instructions, in the jury charge waives the error unless it appears from the appellate record that the charge error was calculated to injure the defendant's rights or prevented a fair and impartial trial, a greatly increased standard of review. Art. 36.19, Tex. Code Crim. Proc. Ann. (Vernon 1981); Grady v. State, 614 S.W.2d 831 (Tex. Crim. App. 1984); Almanza v. State, 686 S.W.2d 157 (Tex. Crim. App. 1984), cert. denied, 481 U.S. 1019, 107 S.Ct. 1901, 95 L.Ed.2d 507 (1987). See Appendix at p. A-37.

Thus, counsel's failure to object to such defects cannot be explained as trial strategy because the error is completely forfeited with respect to the indictment, and reviewed under a much higher standard with respect to the charge, when not properly preserved by objection. In addition, the omission of elements of the offense prejudiced the

Petitioner because it diminished the State's burden of proof and permitted a conviction to be rendered on less than an affirmative finding of all the elements of the offense. The consistent failure by Petitioner's counsel to preserve error in the trial court clearly reflects on her counsel's failure to understand the law and the factual basis for the charges against his client.

Counsel's failure to object to or correct such defects, when considered in combination with counsel's apparent lack of knowledge of the law and facts of the case, must lead to a conclusion that his performance so upset the adversarial balance required for a fair trial that he was not functioning as the "counsel" guaranteed by the Sixth Amendment. Strickland, 466 U.S. at 686; United States v. Cronic, 466 U.S. 648, 655-657, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). Petitioner was prejudiced by counsel's deficient performance

because she was denied her right to substantive and procedural due process under the Fifth and Fourteenth Amendments. See the discussion of prejudice in Part II.

C. Misrepresentation of Law.

The Fourth Court of Appeals adopted the State's characterization of counsel's erroneous arguments that the offense was a third degree felony and that the court had authority to grant probation as trial tactics and zealous representation. See Appendix at p. A-22, 25-27. The Texas Court of Criminal Appeals implicitly approved this reasoning by refusing review.

This issue presents a "Catch-22" because if counsel genuinely did not know the applicable law in Petitioner's case, then he was certainly performing deficiently when he repeatedly made incorrect statements of law to the court. If, on the other hand, counsel did know the applicable law when he made the re-

presentations that he did to the court, then he was intentionally misrepresenting the law in an attempt to gain an advantage for his client. In either scenario, counsel's performance was deficient because he was either acting when unprepared or acting unethically.

In Nix v. Whiteside, 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123, 134 (1986), this Court stated that counsel's breach of an ethical standard does not necessarily constitute a denial of effective assistance, but must be carefully considered in accordance with the standards of professional conduct applied by the particular state to those admitted to practice in its courts. The Court declined in Nix to precisely define the weight to be given to state standards of professional conduct in the context of a Sixth Amendment challenge. Id.

Rule 3.03 of the Texas Disciplinary Rules of Professional Conduct, Tex. Gov. Code, Title

2, Sub. G, App. A, Art. 10, Sec. 9 (Vernon 1993), proscribes a lawyer from knowingly making a false statement of material fact or law to the court. See Appendix at p. A-38. Comment 3 to Rule 3.03 states that legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal, and that the underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

The Fourth Court of Appeals stated that it need not decide the question of whether it is ethical to make legal arguments that counsel knows have no merit. Appendix at p. A-26. However, Petitioner submits that, despite the Court's disclaimer, it did decide that knowingly making false legal arguments can be an ethical method of "zealous advocacy" by refusing to consider such conduct as evidence of deficient performance. The Fourth

Court's opinion does not distinguish between weak legal arguments that can still be asserted in good faith and knowingly false legal arguments, instead characterizing both as "unfounded legal arguments." Appendix at p. A-26-27.

Further, the Fourth Court of Appeals, in its desire to protect such zealous advocacy, seems willing to sanction the resort to extraordinary remedies such as mandamus to correct the results of such "unfounded" legal arguments when they are successful. Appendix at p. A-25. Whether the misrepresentations of law made by Petitioner's counsel to the trial court were made in good faith because counsel was unprepared, or whether they were made knowingly, and therefore unethically, because counsel was engaging in the "zealous advocacy" condoned by the Fourth Court of Appeals, the conduct should have been considered as probative evidence of deficient performance

under Strickland and it was not so considered.

II.

The Opinion of the Texas Court of Criminal Appeals, and of the Fourth Court of Appeals, Conflicts with Lockhart v. Fretwell, 506 U.S. ___, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993).

Petitioner argued in her Motion for Rehearing that the prejudice prong of the Strickland test was misapplied by the Fourth Court of Appeals because the Court focused solely on the trial's result and ignored the equally important issues of the trial's reliability and fairness. The Court attempted to cure its error in its second opinion issued February 28, 1994, by merely adding a conclusion, without appropriate analysis, that the alleged deficiencies did not make the trial unfair or unreliable. See Appendix at p. A-17-18, 21. The Supplemental Opinion reproduced in the Appendix at p. A-4 does not address this issue.

The Court of Appeal's discussion of

prejudice in its opinion still focuses on the result of the trial, and there is minimal discussion of the fairness of the proceedings during the trial and of Petitioner's assertion that her counsel's failure to object to the defects in the indictment and charge lowered the burden of proof for the State, thereby making the trial's result unreliable and unfair. The Court states ". . . that counsel rendered reasonably effective assistance is shown by the fact that he was successful in obtaining the minimum sentence for appellant." Appendix at p. A-24-25.

However, in reaching that result-based conclusion of no prejudice, the Court ignores equally result-oriented evidence of prejudice, to wit: that Petitioner was denied probation (arguably the true "minimum sentence" available to Petitioner) and that she was convicted of a first degree felony. Petitioner was additionally prejudiced from a

result-oriented perspective in that counsel's failure to correct the intent definitions in the charge directly undermined the effectiveness of Petitioner's primary defense that she did not have the requisite intent.

If the omitted language had been included in the jury charge, there is a reasonable probability that the jury would have had a reasonable doubt about Petitioner's intent to threaten the officers with imminent bodily injury given the undisputed testimony that only one shot was fired, the fact that there were no bullet holes in or near the vehicle and the conflicting testimony regarding whether Petitioner fired into the air or in the direction of the vehicle. S.F., Vol. I, p.96,100 -101, 37, 95, 99, 182. Strickland, 466 U.S. at 694.

In Lockhart v. Fretwell, 506 U.S. ___, 113 S.Ct. 838, 122 L.Ed.2d 180, 191 (1993), this Court held that the result of the trial is not the proper focus in determining whether

a defendant was prejudiced by deficient performance. In fact, the Court stated that "any analysis of deficiency based on the trial's outcome is necessarily done through hindsight and is inappropriate." Lockhart, 122 L.Ed.2d at 190-191. This Court viewed the prejudice component of the Strickland test as requiring a disjunctive analysis, involving a determination of whether the result was unreliable or, in the alternative, whether the proceeding was unfair. "Thus, an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." Id. at 189.

The Court went further in Lockhart, providing guidance on how to analyze the existence of unreliability or unfairness in making a determination of prejudice, stating that ". . . unreliability or unfairness does not result if the ineffectiveness of counsel

does not deprive the defendant of any substantive or procedural right to which the law entitles him." Id. at 191. Petitioner asserted in her Motion for Rehearing, and in her Petition for Discretionary Review, that she was deprived of her rights to substantive and procedural due process under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution by her counsel's failure to object to or correct the errors in the indictment and jury charge, thereby permitting her conviction on less than an affirmative finding of all the elements of the charged offense, and by her counsel's lack of preparation on the law and facts of the case. However, the Texas Court of Criminal Appeals refused to correct the conflict with Lockhart when it denied review.

CONCLUSION

Petitioner respectfully prays that this Court grant her Petition for Writ of

Certiorari to the Texas Court of Criminal Appeals based on the violation of Petitioner's right to effective assistance of trial counsel under the Sixth and Fourteenth Amendments to the United States Constitution and the conflict between the opinion of the Fourth Court of Appeals, affirmed by the Texas Court of Criminal Appeals, and this Court's decision in Lockhart v. Fretwell, 506 U.S. ___, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993).

Respectfully submitted,

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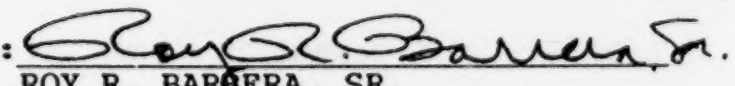
By: 
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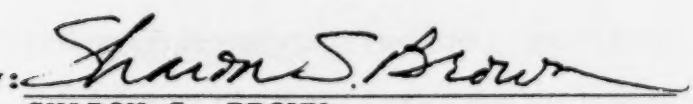
By: 
SHARON S. BROWN

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Re: Court of Appeals Number:
04-92-00254-CR
Trial Court Case Number:
91-07-145-CRW

Style: Van Winkle, Bonnie
v.
The State of Texas

Dear Counsel:

The Appellant's Motion for Stay Issuance of Mandate, Pending for Writ of Certiorari, and to continue defendant on bail in the above styled and numbered cause has this date been GRANTED MANDATE STAYED UNTIL NOVEMBER 25, 1994.

Very truly yours,

HERB SCHAEFER, CLERK

By: /s/ Janie A. Murphy

Janie Murphy,
Deputy Clerk

The State of Texas August 17, 1994
(Seal)
Official Notice COA# 04-92-00254-CR
Court of Criminal Appeals
Re: Case No. 0538-94
Style: VAN WINKLE, BONNIE

(U.S. Postage Stamp-
From Austin -8/17/94)

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

Court of Criminal Appeals
P.O. Box 12308, Capital Station
Austin, Texas 78711

mail to: ROY R. BARRERA, SR.
424 E. NUEVA STREET
SAN ANTONIO, TEXAS 78205

COURT OF APPEALS
FOURTH SUPREME JUDICIAL
DISTRICT OF TEXAS
SAN ANTONIO

(SEAL)

OPINION

Appeal No. 04-92-00254-CR

Bonnie VAN WINKLE,
Appellant

vs.

THE STATE OF TEXAS,
Appellee

Appeal from the 81st District Court of
Wilson County
Trial Court No. 91-07-145-CRW
Honorable J. Taylor Brite,
Judge Presiding

Opinion by: David Peeples, Justice

Sitting: David Peeples, Justice
Alma L. Lopez, Justice
Phil Hardberger, Justice

Delivered and filed: May 4, 1994

SUPPLEMENTAL OPINION ON APPELLANT'S
PETITION FOR DISCRETIONARY REVIEW

In her petition for discretionary review, appellant takes us to task for

not addressing Banks v. State, 819 S.W.2d 676 (Tex. App. --San Antonio 1991, pet. ref'd), and Sneed v. State, 803 S.W.2d 833 (Tex. App. --Dallas 1991, pet. ref'd), which she argues under point of error nine. We respectfully reject the notion that either Sneed or Banks applies to the present case. Appellant was charged with aggravated assault upon a police officer by threatening, not by causing bodily injury, as were Banks and Sneed.

The Sneed court itself made clear that its egregious-harm holding applied only to bodily-injury aggravated assault, not aggravated assault by threatening. The court noted that whether aggravated assault is a result offense or a conduct offense depends upon which of the three kinds of simple assault is involved:

Two of the theories, intentionally,

> knowingly, or recklessly causing bodily injury and intentionally or knowingly causing physical contact are result oriented offenses. The culpable mental state applies to causing the required result rather than to engaging in the conduct. The [third] theory, intentionally or knowingly threatening another with imminent bodily injury is a conduct offense and has no required result. The offense is satisfied if the accused intentionally or knowingly engaged in the prohibited conduct -- threatening with imminent bodily injury. In our case, the State charged Sneed under a result oriented theory.

803 S.W.2d at 835 n.2 (emphasis in original). By its own terms Sneed does not apply to this case involving a conduct offense, in which the underlying simple assault was threatening -- not causing -- injury. Likewise, the offense in Banks was a result-oriented offense -- injury to a child. To threaten is to engage in conduct. To injure is to cause a result.

We reject the suggestion that Sneed

and Banks establish a per se rule that it is egregious error to include both conduct and result language in the charge even if the case involves a conduct-oriented offense. It was central to the reasoning in each case that the defendant could have been convicted for engaging in the conduct even though he was charged with a result-oriented offense. Here, by contrast, the officers were not injured by appellant's gun. She was charged with a conduct offense -- threatening -- and there is no danger that the jury convicted her of causing a result that did not happen. The trial focused primarily on whether appellant was justified in taking the action she took. In contrast to Sneed and Banks, appellant was charged with, and found guilty of, a conduct-oriented offense. Sneed and Banks do not control this case.

DAVID PEEPLES
JUSTICE

DO NOT PUBLISH

COURT OF APPEALS
FOURTH COURT OF APPEALS
DISTRICT OF TEXAS
SAN ANTONIO

(Seal)

OPINION

Appeal No. 04-92-00254-CR

Bonnie VAN WINKLE,
Appellant

v.

THE STATE OF TEXAS,
Appellee

Appeal from the 81st District Court of
Wilson County
Trial Court No. 91-07-145-CRW
Honorable J. Taylor Brite,
Judge Presiding

ON APPELLANT'S MOTION FOR REHEARING

Opinion by: David Peeples, Justice

Sitting: David Peeples, Justice
Orlando Garcia, Justice
Alma L. Lopez, Justice

Delivered and filed: February 28, 1994

APPELLANT'S MOTION FOR REHEARING DENIED;
JUDGMENT AFFIRMED.

Appellant's motion for rehearing is

overruled. Our opinion dated December 29, 1993, is withdrawn and the following is substituted.

A jury found appellant guilty of two counts of aggravated assault upon a peace officer. It assessed punishment at five years' confinement and a $10,000 fine, the sentences to run concurrently. On appeal appellant contends that she received ineffective assistance of counsel, that the trial court erred in failing to admit character evidence, and that the jury charge allowed a conviction based on law and facts that do not constitute an offense. We affirm the judgment.

Appellant was convicted of aggravated assault on two Department of Public Safety Troopers who stopped her eighteen-year-old son. Troopers Eldridge Hughey and Brian Vaughn were parked on the

shoulder of U.S. Highway 181 when Jimmy Van Winkle sped past them in his truck. The trooper turned on their patrol car's overhead lights and began to follow him. Appellant's son did not pull over; he drove until he reached an electric gate at the edge of his parent's property. Appellant, who was in the house, noticed the vehicles' light and listened to the events at the gate through an intercom.

Using the intercom, appellant asked, "What's going on down there?" Her son Jimmy replied, "These idiots down here have me and they're beating me up." When Appellant asked, "Who", "her son answered "Vaughn". Appellant then got a gun and drove down to the gate. By the time she arrived, the troopers already had Jimmy in their marked, black-and-white patrol car. Both the cars' headlights and overhead lights were operating. Accord-

ing to the troopers, appellant pointed her gun at their patrol car and fired a shot as they were driving off.

I. Ineffective Assistant of Counsel

Appellant contends that the performance of her trial counsel was ineffective in that he failed to object to defects in the indictment and jury charge and he did not have adequate knowledge of the facts and law surrounding the case.

Appellant has the burden of establishing ineffective assistance of counsel. Moore v. State, 694 S.W.2d 528, 531 (Tex. Crim. App. 1985). In reviewing the actions taken by counsel during the guilt/innocence phase of trial, we apply the test first enunciated by the Supreme Curt in Strickland v. Washington, 466 U.S. 668 (1984). See Holland v. State, 761 S.W.2d 307, 314 (Tex. Crim. App. 1988), cert. denied, 489 U.S. 1091

(1989); Hernandez v. State, 726 S.W.2d 53, 55-57 (Tex. Crim. App. 1986). Under this test, a convicted defendant must show that (1) his trial counsel's performance was deficient, and (2) the deficient performance prejudiced the defense to such a degree that he was deprived of a fair trial. Holland, 761 S.W.2d at 314; Wilkerson v. State, 726 S.W.2d 542, 548 (Tex. Crim. App. 1986), cert. denied, 480 U.S. 940 (1987). Prejudice, in this context, is demonstrated when the defendant shows a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Holland, 761 S.W.2d at 314; Wilkerson, 726 S.W.2d at 548 n.3. Whether a defendant has received effective assistance of counsel is to be judged by the totality of the represen-

tation, not isolated acts or omissions of trial counsel. Wilkerson, 726 S.W.2d at 548.

Appellant's first two points of error complain of her trial counsel's failure to object to defects in the indictment. The first count of the indictment states that appellant:

> did then and there intentionally and knowingly threaten Eldridge Hughey, a peace officer on the Texas Department of Public Safety, with a deadly weapon, namely: a firearm, by pointing a firearm in the direction of the said Eldridge Hughey, while the said Eldridge Hughey was in the discharge of his official duty, and when the [appellant] knew the said Eldridge Hughey was a peace officer.

[Emphasis added.] The second count makes the same allegations with reference to Brian Vaughn.

Appellant contends that trial counsel should have objected to the indictment for two reasons. First, she

complains that the indictment does not allege a threat of "imminent bodily injury," which is part of the penal code definition of assault. Tex. Penal Code Ann. § 22.01 (a)(2) (Vernon 1989). Second, appellant complains that the indictment is defective because it does not allege that the peace officers were lawfully discharging an official duty, as is prescribed in the language found in the definition of aggravated assault. Tex. Penal Code Ann. § 22.02 (a)(2)A) (Vernon Supp. 1994). Instead the indictment merely states that each officer was "in the discharge of his official duty." Appellant's counsel did not object to the form or substance of the indictment. Accordingly, any error was waived. Tex. Code Crim. Proc. Ann. art. 1.14 (Vernon Supp. 1993); DeDonato v. State, 819 S.W.2d 164, 167 (Tex. Crim.

App. 1991); Flowers v. State, 815 S.W.2d 724, 728 (Tex. Crim. App. 1991). Appellant argues that counsel's failure to object to the indictment constituted ineffective assistance of counsel.

An indictment need only track a particular statute so that the defendant is provided notice of the charges against him. The indictment in question alleges appellant pointed a firearm in the direction of the officers. And it alleges that the officers were in the discharge of their official duties. An indictment must give the defendant notice of what he is charged with. Terry v. State, 471 S.W.2d 848, 852 (Tex. 1971). We cannot say that the indictment in question fails to serve this purpose simply because the exact wording of the statute was not employed. While the indictment could have been more thorough,

failure to object was not deficient lawyering. In any event, proceeding to trial on the indictment did not deny appellant of a fair trial. We cannot say that there is a reasonable probability that the result of the trial would probably have been different if counsel had challenged the indictment, that the result of the trial was unreliable, or that the trial was fundamentally unfair. Points of error one and two are overruled.

On rehearing appellant points out that an indictment must not only give fair notice of the charges but must also be adequate to support a plea of jeopardy later if he was charged again for the same offense. The indictment before us is amply sufficient for that purpose. We also hold that it sufficiently pleads the elements of the offense for purposes of

this ineffective-assistance appeal. The failure to object was neither deficient nor harmful under Strickland and subsequent cases. Not only does the record fail to show a reasonable probability that the result would have been different; we respectfully disagree with appellant that the indictment and counsel's failure to object to it resulted in an unfair proceeding.

Appellant's third and fourth points of error contend that counsel was ineffective in allowing the court to submit a defective jury charge. The court's charge tracks the language used in the indictment:

> Now if you find from the evidence beyond a reasonable doubt that on or about the 3rd day of June, 1991, in Wilson County, Texas, the defendant, Bonnie Van Winkle, did intentionally or knowingly threaten Eldridge Hughey, a peace officer on the Texas Department of Public Safety, with a deadly weapon, namely: a firearm,

> by pointing a firearm in the direction of said Eldridge Hughey, while the said Eldridge Hughey was in the discharge of his official duty, and when the Defendant knew the said Eldridge Hughey was a peace officer, then you will find the defendant guilty as charged in the indictment.

[Emphasis added.] The charge contains a like paragraph providing the same instructions with reference to Brian Vaughn.

Appellant claims counsel's performance was deficient because he failed to object to the omission of a definition of assault in the charge, failed to request a proper definition, and failed to request that the charge require a finding of "threatening with imminent bodily injury" as is detailed in the statutory definition of the offense. See Tex. Penal Code Ann. § 22.01(a)(2) (Vernon 1989). Appellant also argues that counsel should have requested the charge require a

finding that the troopers were "lawfully discharging an official duty." See id. § 22.02(a)(2)(A) (Vernon Supp. 1994).

Although some lawyers would have objected to the charge in question, we cannot say counsel was deficient for deciding not to do so. In any event, the absence of an objection did not affect the outcome of the trial. Because the charge requires a finding that appellant threatened the officers with a firearm, it necessarily requires a finding of a threat of imminent bodily injury, or assault. See Garrett v. State, 619 S.W.2d 172, 174 (Tex. Crim. App. 1981). Moreover, the State introduced evidence indicating the lawfulness of Jimmy Van Winkle's arrest.

Appellant has not shown that counsel fell below the level of effective representation by failing to insist that

the charge include the suggested language. In any event, the failure to include the language in the charge did not probably cause an incorrect result; nor did it deprive appellant of a fair trial. See Lockhart v. Fretwell, ___ U.S. ___, 113 S.Ct. 838, 842, 122 L. Ed. 2d 180, 188-89 (1993). Points of error three and four are overruled.

In her fifth and sixth points of error, appellant contends that her trial counsel did not have adequate knowledge of the law and facts surrounding her case and as a result her defense was so prejudiced as to warrant a new trial. We do not agree.

During voir dire, appellant's counsel objected to the State's characterization of the offense as a first degree felony. Counsel argued that the offense was instead a felony of the

third degree. Appellant contends that this raises the presumption that counsel had not read the body of the indictment. Similarly, appellant contends that if counsel did falsely believe the offense to be a third-degree felony he would have incorrectly considered the range of punishment appellant faced.

The back of the indictment characterizes the offense as a third-degree felony. It is possible that counsel was merely attempting to win a tactical advantage for his client by convincing the court that the offense was only a third-degree felony. Nonetheless, whether appellant received reasonably effective assistance of counsel is to be judged by the totality of the representation, not by isolated acts of omissions. Wilkerson, 726 S.W.2d at 548. The record as a whole fails to support

appellant's contentions.

Moreover, appellant has failed to show any prejudice to her defense. Appellant was indicted and tried for a first-degree felony. The jury was instructed on the current range of punishment for a first-degree felony before sentencing appellant. Again, the second element of Strickland -- prejudice -- has not been established. Points of error six and seven are overruled.

In her seventh point of error, appellant contends that she received ineffective assistance of counsel in the punishment phase of her trial. She contends that counsel, did not have knowledge of the correct range of punishment. Also, appellant contends that counsel was unaware that the court lacked authority to grant probation after the jury had denied probation.

Where ineffective-assistance claims relate only to the punishment phase of a trial we consider whether the assistance received by appellant was "counsel reasonably likely to render and rendering reasonably effective assistance of counsel." Ex parte Duffy, 607 S.W.2d 507, 514 n.14 (Tex. Crim. App. 1980). The record shows that appellant's counsel was prepared and aware of the proper range of punishment, as evidenced by his application to the jury for punishment. When, as in this case, there has been a finding that a deadly weapon was used in the commission of a felony, the Code of Criminal Procedure provides that only the jury can recommend probation. Tex. Code Crim. Proc. Ann. art. 42.12 § 3g (a)(2) (Vernon Supp. 1994. That counsel rendered reasonably effective assistance is shown by the fact that he was success-

ful in obtaining the minimum sentence for appellant.

The provision detailing jury-recommended probation states that it "does not prohibit a court from granting probation in a case if the jury in the case does not recommend probation." Id. 42.12, § 4(c). Appellant's counsel argued that this provision empowered the court to grant probation even though the jury had not recommended probation. However, § 4(c) does not apply to deadly weapon cases. Had counsel been successful in obtaining probation, he would have delayed the imposition of the sentence because the State would have had to proceed with its own appeal or apply for mandamus to have the correct sentence imposed. In no way was appellant prejudiced by counsel's conduct.

In each of these last points --

which involve counsel's characterization of the charge as a third-degree felony and his asking or probation from the court after a deadly-weapon jury finding -- appellant has not shown that counsel was truly unaware that his arguments were legally wrong. Instead, we think counsel was being extremely zealous in representing appellant. Attorneys frequently make weak legal arguments to judges, hoping to obtain a favorable ruling due to the court's unfamiliarity with the law or perhaps inattention. At oral argument appellate counsel suggested that it would not be ethical to make legal arguments that counsel knows have no merit. We need not decide that question. In most cases in this court, one side or the other makes legal arguments that we reject as unfounded. In many such instances, an objective observer would

conclude that some of the arguments should not have been made. But we are not willing to say that the making of unfounded legal arguments shows a deficiency of counsel. We hold simply that counsel's arguments were, in all likelihood, simply zealous advocacy. They certainly did not prejudice appellant's defense. Point of error seven is overruled.

II. Evidence

In her eighth point of error, appellant contends that the court erred in refusing to admit character testimony pursuant to Rules 404 and 608 of the Texas Rules of Criminal Evidence.

Witnesses for appellant were allowed to characterize her as truthful, honest, compassionate, caring, non-violent, peaceable, law-abiding, and God-fearing. However, the State objected when

witnesses were asked if they had "an opinion as to whether [appellant]... could have committed the act that she's charged with in this case." These objections were sustained.

Evidence of a pertinent character trait is admissible whether offered by the accused or by the state in rebuttal. Tex. R. Crim. Evid. 404(a)(1). Also, character evidence of truthfulness is admissible once the credibility of a witness has been attacked. Tex. R. Crim. Evid. 608(a).

The prosecution characterized the appellant and her family as "angry." Likewise, appellant's character for truthfulness was challenged on cross-examination. Accordingly, appellant was allowed to present character evidence on these character traits. The State objected only when appellant sought to

elicit testimony on an ultimate issue reserved for the jury. The court had the discretion to exclude this testimony which amounted to character witnesses testifying as to whether appellant would commit the crime. Point of error eight is overruled.

III. Fundamental Charge Error

In point of error nine, appellant contends that error in the jury charge allowed the jury to convict her on law and facts now constituting an offense. Because there was no objection to the jury charge, appellant must show fundamental error causing egregious harm such that she was denied a fair and impartial trial. Almanza v. State, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985). In measuring the degree of harm, we must examine the record as a whole, including the entire jury charge, the state of the

evidence, and the arguments of counsel. Id.

Aggravated assault is defined as (1) threatening with a deadly weapon, (2) a person who is a peace officer, (3) having knowledge the person assaulted was a peace officer, (4) while the peace officer was lawfully discharging an official duty. Tex. Penal Code Ann. § 22.02(a)(2)(A) (Vernon Supp. 1994); Damian v. State, 776 S.W.2d 659, 662 (Tex. App.--Houston [14th Dist.] 1989, pet. ref'd).

The charge required the jury to find that appellant (1) intentionally or knowingly threatened a police officer, (2) by pointing a firearm in the officer's direction, (3) while the officer was discharging an official duty and (4) while knowing him to be a peace officer.

Appellant contends that it was egregious error to allow a conviction based on a charge that failed to define assault, failed to require a finding of threatening imminent bodily injury, and failed to require a finding that the officers were lawfully discharging their official duties.

Adding the language stressed by appellant would have contributed little to this charge. In any event, appellant has not shown that omission of this language resulted in an unfair trial.

The jury found that appellant threatened the two officers by pointing a firearm at them. Certainly this finding encompasses the definition of assault and the element of threatening imminent bodily injury. See Tex. Penal Code Ann. § 22.02(a)(2) (Vernon 1989); Garrett v. State, 619 S.W.2d 172, 174 (Tex. Crim.

App. 1981).

Regarding the charge's failure to require a finding that the officers were lawfully discharging their duties, the crux of appellant's argument is that the arrest of Jimmie Van Winkle was unlawful. This, however, is irrelevant. A conviction for aggravated assault does not depend upon whether the arrest was legal. Salazar v. State, 643 S.W.2d 953, 956 (Tex. Crim. App. 1983). Even when an arrest is unlawful, officers executing the arrest are in the lawful discharge of their duties. Tex. Penal Code Ann. § 38.03(a), (b) (Vernon 1989 & Supp. 1994); Salazar, 643 S.W.2d at 956; Gonzales v. State, 574 S.W.2d 135, 137 (Tex. Crim. App. 1978).

Appellant was not harmed by the court's failure to include the term "lawfully" in its charge. There is no

showing that appellant was denied a fair and impartial trial. Appellant's ninth point of error is overruled.

We have carefully considered all of appellant's points of error on rehearing and all are overruled.

The judgment is affirmed.

DAVID PEEPLES

Justice

DO NOT PUBLISH

The indictment in Petitioner's case, Trial Court No. 91-07-145-CRW, reads in each of the two counts as follows:

> ...Bonnie Van Winkle did intentionally and knowingly threaten Eldridge Hughey [Brian Vaughan in 2d count], a peace officer..., with a deadly weapon, namely: a firearm, by pointing a firearm in the direction of the said Eldridge Hughey, while the said Eldridge Hughey was in the discharge of his official duty, and when the Defendant knew the said Eldridge Hughey was a peace officer;
>
> Tr., p. 1.

The jury charge in Petitioner's case, Trial Court No. 91-07-145-CRW, reads in pertinent part as follows:

> Now if you find from the evidence beyond a reasonable doubt that on or about the 3rd day of June, 1991, in Wilson County, Texas, the defendant, Bonnie Van Winkle, did intentionally or knowingly threaten Eldridge Hughey, a peace officer on the Texas Department of Public Safety, with a deadly weapon, namely: a firearm, by pointing a firearm in the direction of said Eldridge Hughey, while the said Eldridge Hughey was in the discharge of his official duty, and when the Defendant knew the said Eldridge Hughey was a peace officer, then you will find the defendant guilty as charged in the indictment.
>
> Tr., p. 25.

The charge contains a like paragraph providing the same instructions with reference to officer Brian Vaughn.

Section 22.01(a)(2) of the Texas Penal Code Ann. (Vernon 1989), provides in pertinent part as follows:

> (a) A person commits an offense if the person: . . . (2) intentionally or knowingly threatens another with imminent bodily injury . . .

Section 22.02(a)(2)(A) of the Texas Penal Code Ann. (Vernon Supp. 1994), provides in pertinent part as follows:

> (a) A person commits an offense if the person commits assault as defined in Section 22.01 of this code and the person: . . . (2) threatens with a deadly weapon or threatens to cause bodily injury or causes bodily injury to . . . a peace officer . . . when the person knows or has been informed the person assaulted is . . . a peace officer . . . (A) while the . . . peace officer . . . is lawfully discharging an official duty . . .

Article 1.14(b) of the Texas Code of Criminal Procedure Ann. (Vernon Supp. 1993), provides in pertinent part as

follows:

> (b) If the defendant does not object to a defect, error, or irregularity of form or substance in an indictment . . . before the date on which the trial on the merits commences, he waives and forfeits the right to object to the defect, error, or irregularity and he may not raise the objection on appeal or in any other postconviction proceeding.

Article 36.19 of the Texas Code of Criminal Procedure Ann. (Vernon 1981), provides in pertinent part as follows:

> Whenever it appears by the record in any criminal action upon appeal that any requirement of Articles 36.14, 36.15, 36.16, 36.17 and 36.18 [pertaining to the court's charge] has been disregarded, the judgment shall not be reversed unless the error appearing from the record was calculated to injure the rights of defendant, or unless it appears from the record that the defendant has not had a fair and impartial trial. All objections to the charge and to the refusal of special charges shall be made at the time of the trial.

Article 42.12, § 3g(a)(2) of the Texas Code of Criminal Procedure Ann. (Vernon Supp. 1994), provides in pertinent part as follows:

> (a) The provisions of Section 3 of this article [authorizing judge to grant probation] do not apply: . . . (2) to a defendant when it is shown that a deadly weapon as defined in Section 1.07, Penal Code, was used or exhibited during the commission of a felony offense . . .

Rule 3.03 of the Texas Disciplinary Rules of Professional Conduct, Texas Government Code, Title 2, Sub. G, App. A, Art. 10, Sec. 9 (Vernon Supp. 1993), providing in pertinent part as follows:

> A lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal; . . . (4) fail to disclose to the tribunal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.